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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1692

DONALD PERCY, Secretary,
WISCONSIN DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,
Petitioner,

v.

RONALD FRANCIS TERRY a/k/a
BARBARA LYNN TERRY,
Respondent.

PETITIONER'S REPLY MEMORANDUM

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ARGUMENT

I. The Decision Below Was The Direct Result Of This Court's Decision In *O'Connor v. Donaldson*.

The respondent asserts that the Wisconsin Supreme Court reached the decision it reached only as an interpretation of state law. This assertion does not accurately reflect either the decision of the Wisconsin Supreme Court or the reasons that court articulated for its decision.

The respondent initially asserts, Respondent's Brief in Opposition, p. 3, sentence one, that *commitment* standards were determined by the legislature and the administrative agencies and were not left open by *O'Connor v. Donaldson*, 422 U.S. 563 (1975). The petitioner agrees. This petition deals, however, not with commitment standards, but rather with whether, when and by what procedures involuntary confinement may be *continued*.

O'Connor v. Donaldson clearly left these questions open. *O'Connor v. Donaldson* decided the substantive due process issue, viz., that the state may not deprive the individual of liberty unless to protect the individual or to protect society; *O'Connor v. Donaldson* did not decide the mechanism to challenge the continued need of the state to deprive the individual of liberty after the individual's liberty was properly taken.

The only Wisconsin statutes that address that issue established the procedures of sec. 975.09, Wis. Stats., and sec. 975.10, Wis. Stats. (Ap. 124). In requiring a hearing as part of sec. 975.09, it is clear the Wisconsin Supreme Court believed itself required by federal law to so hold. No requirement of hearing is set forth in sec. 975.09. It is clear that the Wisconsin Supreme Court believed that under *O'Connor v. Donaldson* criminally convicted and adjudged sex deviates were entitled to procedural due process in the form of a hearing, and it believed that the process due was a hearing as contemplated by *Morrissey v. Brewer*, 408 U.S. 471 (1972). When a state supreme court feels bound to decide state law because of what that court perceives to be controlling federal law, an adequate jurisdictional basis exists for this Court. *Zacchini v. Scripps-Howard Broadcasting Co.*, 97 S. Ct. 2849, 2853-2854 (1977); *Missouri v. Mayfield*, 340 U.S. 1, 5 (1950).

II. The Wisconsin Statutes Do Not Require The Hearing Procedures Mandated By The Wisconsin Supreme Court.

The respondent asserts that Wisconsin statutes control this case and that the petitioner seeks to draw this Court into a statutory construction argument. Additionally, respondent asserts that he is entitled to the hearings ordered by the Wisconsin Supreme Court because other people committed, in situations different to respondent's, are allowed procedures more elaborate than those provided by sec. 975.09.

As to the first assertion, the petitioner does not seek to draw this Court into a matter of statutory construction because petitioner does not dispute that in implementing sec. 975.09, the review of treatment there provided includes a review of the continued need for custody. The petitioner has not taken any different position. Petitioner has, however, asserted that sec. 975.09 covers more than deciding the continued need for custody. That proposition is not subject to any dispute because of the clear language of the statute.

As to the second assertion, respondent asks this Court to change the basis of the state court decision to reflect respondent's position that the state denies a criminally convicted and adjudged sex deviate equal protection of the law because other commitments may be challenged by more procedurally elaborate proceedings. Respondent lost that argument in the state court (Ap. 111-116). Respondent has not sought review. This ground in opposition to granting certiorari ought to be rejected.

CONCLUSION

This Court ought to issue its Writ of Certiorari to the Wisconsin Supreme Court.

Respectfully submitted,

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